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Supreme Court of the United States

OCTOBER TERM, 1957

No. 421

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

versus

MADGE REED WATKINS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR CHILD, RICHARD WESLEY WATKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MADGE REED WATKINS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR CHILD, RICHARD WESLEY WATKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, The Texas and Pacific Railway Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on April 12, 1957, rehearing denied June 14, 1957, which, by a divided court, affirmed a judgment of the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The opinion of the District Court (R. 249-251) is unreported. The opinion of the Court of Appeals (R. 268-276) is reported in 243 F. 2d 171.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1957 (R. 277). Petition for rehearing was duly applied for on May 2, 1957 (R. 278), and denied on June 14, 1957 (R. 300). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Whether, as a matter of Louisiana law, a decedent, without stopping, looking or listening, or even proceeding cautiously, can drive into the side of a moving passenger train while attempting to negotiate an open, rural, private railroad crossing without being contributorily negligent?

(2) Whether, as a matter of Louisiana law, the presence of a moving passenger train on a private, rural, open railroad crossing constitutes notice to drivers of the train's presence?

(3) Should the verdict of a jury condemning a defendant to pay $35,000 be allowed to stand where there was no proof of negligence on the part of the defendant that had any causal connection with the accident?

STATUTES INVOLVED

None. This case concerns only the application of the Louisiana jurisprudence.

STATEMENT

Jurisdiction in the District Court was founded on diversity, 28 U.S.C., Section 1332. The Plaintiff, individually and as natural tutrix of her minor child, Richard Wesley Watkins, filed her complaint April 12, 1955, for

the recovery of damages from Petitioner under the provisions of Article 2315 of the Louisiana Revised Civil Code of 1870 in the amount of $218,213.00 allegedly suffered by herself and her minor child as the result of the death of the husband and father, Opal Watkins, on April 14, 1954. The complaint alleged that the death of said Watkins occurred as a result of a collision between Petitioner's train and a tractor driven by said Watkins, at a private crossing located on the Green and Gold Plantation near Luling, Louisiana. The complaint further alleged that the said collision was caused solely through the negligence of Petitioner's employees. The Petitioner answered denying the liability asserted and set up as an affirmative defense that the death of said Watkins was caused solely through his own negligence, and, alternatively, that the claim of Plaintiff was barred by virtue of the contributory negligence of Watkins. The United States Casualty Company, the compensation insurer of said Watkins' employer, intervened in the action, demanding the recovery out of any judgment awarded of the amount of compensation and other expenses paid or to be paid to the present Plaintiff. By stipulation it was agreed that the total of the Intervenor's claim was in the sum of $6,076.00. The trial of the case began on May 12, 1956, and Petitioner's counsel, after presentation of Plaintiff's evidence, moved for a directed verdict. This motion for a directed verdict was denied and, as a result thereof, Petitioner presented its evidence. After presentation of all of the evidence, Petitioner again moved for a directed verdict, which motion was also denied. After closing arguments by both counsel and after instruction by the trial judge, the jury on May 13 retired and, after deliberating five hours, returned a verdict in favor of the Plaintiff in the amount of $35,000.00. Petitioner within the proper time then moved for a judgment

non obstante veredicto, and, alternatively, for a new trial which were respectively denied and refused by the trial judge who gave written reasons therefor (R. 250-251). In due course notice of appeal was given and the transcript properly filed.

Upon appeal from the District Court's judgment, the Court of Appeals affirmed (R. 277), one judge dissenting.

In affirming the District Court, the Court of Appeals held that a death action may be maintained and recovery had when a tractor driver, familiar in all respects with train schedules and the conditions surrounding a private rural crossing, on a foggy morning drove into the side of a moving passenger train without stopping, looking or listening, or even proceeding cautiously in accordance with his employer's specific instructions, in his attempt to cross the railroad track.[1] The Court of Appeals also stated that, under the Louisiana law, proof of the contributory negligence of the driver of a tractor who runs into the side of a moving train can only be shown through proof that the tractor driver knew (not should have known) a train occupied the crossing.[2] The Court further held that, because the "standing train doctrine" has no application to a situation where a train is

[1] The majority opinion states on pages 6 and 7 (R. 273, 274):

"* * * Whether with fog obscuring the track beyond 75 feet he ought to have anticipated that a train would suddenly emerge without warning, whether with fifteen feet and one second then between him and eternity Watkins ought to have stopped and had he, whether with time and distance for response and subsequent braking action, he could have stopped, whether he should have turned to the left instead of the right was the very stuff of which the ordinary prudent man is compounded."

[2] The majority opinion states (R. 275):

"The rule is one of common sense, *Atlantic Coast Line R. Co. v. Kammerer*, 5 Cir., 239 F. 2d 115, and it cannot be applied to establish contributory negligence as a matter of law when its assertion assumes, without more, what is really in question, that is the decedent's knowledge that a train was there, *Kansas City Southern R. Co. v. Wiggins et al*, 5 Cir., 234 F. 2d 128, 132.

moving, the failure of the District Court to instruct the jury, upon Petitioner's attorney's request, that " a train across a highway constitutes a most impressive notice to drivers of motor vehicles that the crossing is temporarily blocked" was not reversible error.[3]

Petition for rehearing was duly filed and denied, with one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

(1) The Court of Appeals erred in holding, despite the Louisiana law that contributory negligence is a complete bar,[4] that recovery could be had in a death action where the decedent, on a foggy morning, drove into the side of a moving passenger train occupying a private rural crossing, without stopping, looking or listening or even observing the specific instructions issued by his employer.

(2) The Court of Appeals erred in holding that, Petitioner's requested instruction to the jury that "a train across a highway constitutes a most impressive notice to drivers of motor vehicles that crossing is temporarily blocked" was properly refused by the trial judge.

REASONS RELIED ON FOR GRANTING THE WRIT

The court below, by virtue of its decision in allowing recovery of damages for Petitioner, nullified the established policy of Louisiana as announced by its highest

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[3] In footnote 9, contained on page 8, the majority opinion states (R. 275):

> "This disposes of the further asserted error that the Court should have given the Railroad's requested instruction: 'a train across a highway constitutes a most impressive notice to drivers of motor vehicles that crossing is temporarily blocked'."

[4] *Daricek v. Forrest*, 173 So. 601.

courts requiring the driver of a vehicle who negotiates a railroad crossing to first stop, look and listen, or at least to proceed so cautiously as to be able to instantly stop, before entering a crossing. An important question has thus been decided contrary to this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, which requires, in matters of this kind, the application of Louisiana law.

The court below erred in deciding that the "standing train doctrine", although applied to almost identical situations many times by the Louisiana courts, did not apply to a moving passenger train which occupied a private rural crossing.

The court below erred in holding that contributory negligence of the driver of a vehicle who collides with the side of a moving train can be shown only through testimony proving actual knowledge on the part of the driver of the train's presence.

The decision of the Court of Appeals has, therefore, decided important Louisiana questions in complete disregard of the applicable Louisiana law.

Prior to the instant decision no federal or state court situated in Louisiana ever allowed recovery by either the driver of a vehicle or his survivor where such driver drove into the side of a moving or stationary train occupying the crossing. *Newsom v. Illinois Cent. R. Co.*, 122 So. 874 (1929); *Sweeney v. Missouri Pac. R. Co.*, 149 So. 147 (1933); *Jones v. Texas & P. Ry. Co.*, 154 So. 768 (1934); *Gates v. Arkansas & L. M. Ry. Co.*, 180 So. 835 (1938); *Domite v. Thompson*, 9 So. 2d 55 (1942); *Arnold v. Illinois Cent. R. Co.*, 32 So. 2d 76 (1947); rehearing den. 33 So. 2d 99 (1947); *Ramsey v. Louisiana & A. Ry. Co.*, 70 So. 2d 171 (1954); *Smith v. Texas & N. O.*

R. Co., 70 So. 2d 175 (1954); *Harris v. McDermott*, 91 So. 2d 897 (1956); *Allen v. Texas & Pacific Ry. Co.*, 195 F. 2d 545 (1952); *United States Fidelity & Guaranty Co. v. McCullough*, 202 F. 2d 269 (1953), cert. den. 346 U.S. 868, 98 L. Ed. 378; *DeLoach v. Louisiana & Arkansas R. Co.*, 210 F. 2d 921 (1954).

In every case where a recovery was allowed for personal injuries or loss incurred when a motor vehicle struck the side of either a standing or moving train, the plaintiffs in suit have been guests or the guests' representatives and not the driver or the driver's representatives with the result that the contributory negligence of the driver could not be imputed to the plaintiff. *Martin v. Yazoo & M. R. Co.*, 181 So. 571 (1938); *Squyres v. Baldwin*, 191 La. 249, 185 So. 14 (1938); *Arnold v. Illinois Cent. R. Co.*, 32 So. 2d 76 (1947); rehearing den. 33 So. 2d 99 (1947); *Atlanta & St. Andrews Bay Ry. Co. v. Church*, 212 F. 2d 688 (1954). However, even in the guest-passenger situation the majority of cases have denied recovery to the guest because of the absence of a showing of negligence on the part of the railroad or the independent contributory negligence on the part of the guest for failing to keep a proper lookout for his own safety under the circumstances. *Plummer v. Gulf M. & N. R. Co.*, 153 So. 323 (1934); *Aaron v. Martin*, 172 So. 840 (1937, Ct. of App.), aff'd 177 So. 242 (1937, Sup. Ct.); *Cuccia v. Gulf M. & N. R. Co.*, 180 So. 513 (1938); *Murray v. Yazoo & M. V. R. Co.*, 183 So. 543 (1938), rehearing den., 184 So. 413 (1938); *Senegal (Muller) v. Thompson*, 91 So. 2d 865 (1956); *Senegal v. Thompson*, 91 So. 2d 897 (1956).

The Louisiana courts in denying recovery to plaintiff have based their decisions upon the fundamental policy of the state which requires all drivers (and even

passengers), for their own safety, to stop, look and listen or to proceed with extreme caution before negotiating a railroad crossing. As was stated by the Louisiana Supreme Court in *Barnhill v. Texas & P. Ry. Co.*, 109 La. 43, 33 So. 63:

> "The greater the difficulty of seeing and hearing the train as he approaches the crossing, the greater caution the law imposes upon the traveler.
>
> "The traveler, however, is rigidly required to do all that care and prudence would dictate to avoid injury, and the greater the danger the greater the care that must be exercised to avoid it, as where, because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary."

See also *Illinois Central Railway Co. v. Leichner*, 19 F. 2d 118, wherein the Fifth Circuit Court of Appeals stated:

> "Controlling Louisiana decisions show that the law of that State exacts from the driver of an automobile who approaches a railroad crossing, where the view along the track from a direction from which a train may come is obstructed, **the duty to stop, look, and listen before driving upon the crossing, or so near thereto as to be endangered by a passing train; that the greater the difficulty of seeing the greater the caution the law imposes upon him to use his senses of sight or hearing,** one or both, when and where a reasonable and practicable use thereof would enable him to learn of the presence or absence of danger at the crossing; and that, though the operator of the railroad is chargeable with negligence which was a proximate cause of an injury to the traveler

> at the crossing, a right to recover damages for that injury is barred if the traveler's negligent failure to do all that care and prudence would dictate to avoid injury **was a proximate contributing cause of the injury sustained.** * * * " (Emphasis ours.)

As a matter of fact, reference to decisions of the Fifth Circuit itself will show that the requirement on the part of a driver to stop, look and listen before negotiating a known crossing has many times been recognized and applied and recovery thereby denied. *Cf., Illinois Central Railway Co. v. Leichner, supra; Allen v. Texas & P. Ry. Co., supra; United States Fidelity & Guaranty Co. v. McCullough, supra; DeLoach v. Louisiana & Arkansas R. Co., supra; Thompson v. Cormie*, 220 F. 2d 692.

The Court of Appeals in the instant case clearly recognizes the fact that plaintiff's decedent drove into the side of the train somewhere near its front without stopping, looking and listening, or even observing his employer's safety regulations, before attempting to negotiate the crossing.[5] Having once recognized the fact

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[5] (R. 273-274):

"Whether with fog obscuring the track beyond 75 feet he ought to have anticipated that a train would suddenly emerge without warning, whether with fifteen feet and one second then between him and eternity Watkins ought to have stopped and had he, whether with time and distance for response and subsequent braking action, he could have stopped, whether he should have turned to the left instead of the right was the very stuff of which the ordinary prudent man is compounded."

(R. 269):

"While both were in motion the tractor, somewhere near its front end, collided with some part of the train on the north side of the crossing killing Watkins immediately."

(R. 274):

"If the train suddenly, without notice, broke out of the fog so that its presence became known to Watkins as it came abreast his tractor then traveling the few remaining feet to the track, * * *."

(R. 274):

"And yet, on this hypothesis, the Railroad's action was not the less the cause merely by reason of the fact that the physical contact was from the tractor running into the train."

that the plaintiff's decedent did not stop, look and listen, or even obey his employer's safety regulations, as a matter of Louisiana law contributory negligence on the part of the plaintiff's decedent resulted. *Allen v. Texas & Pacific Ry. Co., supra.* Hence, if the court had properly applied the applicable law, recovery should have been denied.

The effect of the decision of the court below is of prime importance because the question of the contributory negligence of the plaintiff's decedent involves a question of the established policy of the State of Louisiana. If allowed to stand, drivers of motor vehicles, before crossing a railroad intersection, will no longer be required to stop, look and listen or even to proceed cautiously in accordance with their employer's safety regulations where adverse visibility conditions exist. Thus, this Court is now concerned not only with the situation where the decision of the court below is in conflict with decisions of the highest courts of Louisiana but with the abrogation of a long established Louisiana policy formulated for the express purpose of protecting the public safety.[6]

The decision of the court below creates a liability

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[6] As was stated by the court in *Domitz v. Thompson*, 9 So. 2d 55:

"* * * This conclusion brings the case squarely within the general rule that the presence of a train across a highway is adequate notice and warning to motorists that the road is blocked. The rule is also well established that a motorist is required for his own safety and protection, if for no other reason, to maintain such rate of speed and lookout as will enable him to stop his vehicle within the distance illumined by its lights. This rule, a safe and sane one, when observed, served to avert hundreds of accidents which would certainly occur but for such observance."

where no fault on the part of the respondent existed.[7] To create liability without fault cannot but result in injustice to the party condemned. Certainly, where no fault exists, the verdict of a jury should be set aside and nullified. Otherwise, the provisions for directed verdicts and judgments *non obstante veredicto* have no place in the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 22, 1957.

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[7] The dissenting opinion (R. 275-276) states:

"I dissent. I think there was no proof of negligence on the part of the railroad that had any causal connection with the collision, on a private road, with a tractor whose driver crossed the track daily and who was under standing instructions from his employer to approach the track cautiously. Moreover, the testimony of the only eyewitness completely ruled out any possibility that the tractor was struck by the locomotive."

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16294

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

versus

MADGE REED WATKINS, Individually and as Natural Tutrix of her Minor Child, RICHARD WESLEY WATKINS,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 12, 1957.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

BROWN, Circuit Judge: As though almost at hand were the day of the juridical Univac, in which data on weather, distance, speed, time, maxima-minima variables, favorable and unfavorable inferences are fed into its insatiable maw there to be stored, sorted, weighted, compared and digested, the Railroad with great earnestness insists that mechanically there can be no liability for the crossing death of Opal Watkins because the tractor hit the train, not the train hit the tractor. The jury with its cruder abacus delivered a contrary result.

The accident took place in the early morning hours at the crossing of a private road over the railroad track as it runs east and west through the Green & Gold Plantation for whom Watkins worked. The passenger liner was eastbound, and Watkins, on the north side of the track, was driving a large, cumbersome diesel tractor pulling an implement on or adjacent to the crossing road in the course of going to the plantation fields south of the track. There was, to the Railroad's knowledge, a considerable movement of employees and heavy farm equipment over this crossing every morning and during the day. While both were in motion the tractor, somewhere near its front end, collided with some part of the train on the north side of the crossing killing Watkins immediately.

Testing this, as we must with all inferences most favorable to the jury verdict, there was ample, believable evidence which the jury could and presumably did credit as to other circumstances. There was heavy fog reducing visibility to a range between 50 and 100 feet, and the noise of the large, heavy duty diesel tractor was sufficient to offset or drown out the rumbling noise of an oncoming train. The angle is disputed, but the tractor's course ranged toward the southeast so that train and tractor were converging with the train approaching behind Watkin's back. This crack passenger train, running 10 minutes late, was making 65 miles per hour or approximately 96 feet per second. The whistle for this private, but known, crossing was not blown until after the impact and when the engine was right on, or just beyond, the crossing. And in the lookout maintained by him, the engineer never saw the tractor, although a wide view of the right of way and crossing road was unobstructed and, on any of the Railroad's theoretical hy-

pothesis, the tractor was not farther than 20 to 30 feet from the track as the train approached and went through the crossing.

This, with evidence that the plantation operators had for some time warned the Railroad's management of dangers of this crossing as this daily movement of slow, awkward, unmanageable farm equipment made its daily trek to and from the work fields frequently in fog and other circumstances of reduced visibility, was sufficient to allow the jury to conclude that, under applicable Louisiana principles,[1] the Railroad had failed to exercise due care by earlier blowing effective warning signals, reducing speed, increasing vigil, or the like, because of the special hazards and dangers of that crossing under those known conditions.

Notwithstanding this ample basis for the jury's verdict, the Railroad insists that evidence otherwise favorable to the plaintiffs demonstrates either that the train was so far through the crossing that the decedent must simply have run into the side of an obvious, moving train, or, in any case, if the initial impact were near the front of the train, the tractor driver had time and distance within which to act, and his failure compels a finding of contributory negligence as a matter of law.[2]

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[1] *Kansas City Southern Ry. Co. v. Wiggins*, 5 Cir., 234 F. 2d 128, 131. *Guidry v. T. & N. O. Ry. Co.*, La. Ct. App., 20 So. 2d 637, 638, see second appeal 56 So. 2d 611, approved, from 22 Ruling Case Law, Railroad, §233, p. 1004, 1005:

> "* * * A railroad is bound to exercise reasonable care in the operation of its trains and to avoid injury to persons and animals at all crossings, private as well as public; and if by reason of peculiar or extraordinary circumstances surrounding a crossing and known to the trainman, prudence would require an alarm or signal to be given by an approaching train, then its omission is negligence."

[2] See, e.g., *United States Fidelity & Guaranty Co. v. McCullough*, 5 Cir., 202 F. 2d 269, cert. den. 346 U.S. 868, 98 L. Ed. 378; *Wyche v. Brian*, 28 So. 2d 143; *Illinois Central Railroad Co. v. Leichner*, 5 Cir., 19 F. 2d 118.

While the evidence from photographs and car repairmen was impressive and the jury might have concluded that the initial impact was at the first point of serious damage to the third car (approximately 300 feet from the front end), this conclusion was not compelled. The construction of the tractor, the light damage to its left front wheel, radiator shell and fan blade was sufficient to permit the jury to conclude that the initial impact was nearer the front of the train and, with the weird imponderables[3] of accidents, this whipped the tractor around throwing it forceably against the car's side as it sped by.

This narrows the Railroad's attack then to inferences of time, distance and opportunity which it claims are compelled by the witness Tastet's testimony.[4] But this intricate analysis[5] with its fine calculations, some of

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[3] A glass water jug hanging in the cab of the tractor was undamaged.

[4] Tastet was in a truck south of the track turning from a side road into the crossing road. He had a full, but momentary, view of the track, train and tractor. When the engine entered the crossing it cut off his view of the tractor. In the moment preceding that, he saw the train come out of the fog when it was 75 to 100 feet from the crossing at which time the tractor, apparently at some angle, was 15 to 20 feet from the crossing. The train and tractor kept coming on and in an instant collision occurred.

He estimated the tractor's speed at 8 to 10 miles per hour (11.7 and 14.66 feet per second, respectively) and stopping distance at this speed at 8 to 10 feet for a planned stop but "a sudden stop would even be a little bit further * * *."

[5] Reading into Tastet's estimated distance of "15 to 20 feet" the assumption that the distance, 15 or 20, was the perpendicular, north and south, from the front end of the tractor to the nearer, north, rail the Railroad on the further assumption that the tractor was approaching at a 45 degree angle constructs two right angle triangles which produce an hypotenuse of 21.2 feet and 28.5 feet, respectively.

The nature of the reasoning which the Railroad insists "reasonable men" are compelled to follow, and the choices open to Watkins as his life reached its close, is then elaborated on in the Railroad's brief:

> "If the tractor was 15 feet from and approaching the track at a 45° angle, * * * it would have to travel 21.2 feet to reach the crossing * * *. The train being 75 feet away when it came out of the fog and travelling in excess of 65 miles per hour (therefore travelling more than 95.4 feet per second) and decedent being 15 feet away from the track travelling at the rate

(Continued)

which are based on assumptions which the jury did not have to make even if its reasoning process took this form, fails to reckon with several things of importance. The first is that the necessity for sudden action in these fleet-

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[3] (Continued)

of 10 miles per hour (14.66 feet per second) it would take the train one second to be more than 20.4 feet past the crossing, at which time the tractor would still be 6.54 feet from the crossing. It would take the tractor 9/20ths of one second to travel the remaining 6.54 feet, during which time the train would have travelled more than 45.9 feet, or a total of more than 66.3 feet past the crossing. For every mile per hour the train exceeded 65 miles per hour, the train would travel approximately 2 feet more for the one and nine-twentieths of a second it would take the tractor to reach the crossing. If the tractor was 20 feet from the track, it would have to travel 28.5 feet to reach the crossing * * * and, travelling at 8 miles per hour (11.7 feet per second) and the train 75 feet from the crossing, travelling in excess of 65 miles per hour, it would take the tractor 2.436 seconds to reach the crossing. In these 2.436 seconds, the train would have travelled 232.39 feet, less the 75 feet it was from the crossing, or the train [engine] would be 157.39 feet past the crossing. For every mile per hour the train exceeded 65 miles per hour, the train travelled 3.56 feet for the 2.436 seconds it took for the tractor to reach the crossing."

On assumption that the tractor was 15 feet, the train 100 feet from crossing, with tractor moving at 10 miles per hour:

"The tractor 15 feet away from the track would have to travel 21.2 feet to reach the crossing, which would take 1.45 seconds. During this time, the train [engine] would have travelled 141.3 feet and would therefore be more than 41 feet past the crossing."

On assumption that the tractor was 20 feet, the train 75 feet from the crossing, with tractor moving at 8 miles per hour:

"Using these figures, the tractor would take 2.436 seconds to reach the crossing, during which time the train [engine] would have travelled 232.39 feet and would therefore be 157.39 feet past the crossing when the impact occurred."

On Watkins' failure to take action:

"When the tractor was 15 feet from the track and approaching at a 45° angle, it would have to travel 21.2 feet to reach the crossing point * * * If Watkins had applied his brakes at that time, he could have stopped with an 11.2 foot clearance. If the tractor was 20 feet from the track, it would have to travel 28.5 feet to its point of crossing * * * and therefore Watkins could have stopped with an 18.5 foot clearance. Obviously, if the tractor was the slightest distance more than 10 feet from the crossing, the train could have passed in absolute safety. Yet the accident occurred.

" * * * Notwithstanding that, if Watkins had been alert and had seen the train when he should have, he merely had to make a 45 degree turn to the left and by placing his tractor parallel to the path of the train, the train could have passed in absolute safety. Yet, he neither stopped nor turned his vehicle."

ing moments was precipitated by the train's failure earlier to blow an audible warning signal and repeat it if necessary as the engine broke through the fog and could see, had lookout been kept, the tractor on its apparent course toward destruction. Whether with fog obscuring the track beyond 75 feet he ought to have anticipated that a train would suddenly emerge without warning, whether with fifteen feet and one second then between him and eternity Watkins ought to have stopped and had he, whether with time and distance for response and subsequent braking action, he could have stopped, whether he should have turned to the left instead of the right was the very stuff of which the ordinary prudent man is compounded.

Appealing as is the illusion of certainty, *Miss. Valley Barge Line Co. v. Indian Towing Co. Inc.*, 5 Cir., 232 F. 2d 750, AMC , liability cannot be resolved by a mechanical formula which, with chicken-or-the-egg-inquiry, attempts to fix *who* hit *whom*. If the train suddenly, without notice, broke out of the fog so that its presence became known to Watkins as it came abreast his tractor then travelling the few remaining feet to the track, the train, in the time it takes to say the words[6] "one locomotive" would have moved 100 feet. And yet, on this hypothesis, the Railroad's action was not the less the cause merely by reason of the fact that the physical contact was from the tractor running into the train.[7]

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[6] A fairly reliable rough way to judge time in seconds.

[7] An opposite situation is as readily supposed: a tractor is stationary or moving slowly a few feet from the crossing apparently indicating to the locomotive engineer that it will await the passing of the train when, too late in time and too close in distance, the tractor suddenly moves toward the track and the train hits it broadside. The tractor's action would be the cause even though the train hit the tractor. See, e.g., *Brown v. Louisville & Nashville R. Co.*, 5 Cir., 234 F. 2d 204.

Nor does the standing train rule[8] afford an insulation from the jury verdict. The train was not standing. It was moving.[9] Indeed, it was moving at high speed and what appeared to be an open crossing to the tractor-driver within the sounding of a trump was suddenly occupied by a train which just as quickly went away. The rule is one of common sense, *Atlantic Coast Line R. Co. v. Kammerer*, 5 Cir., 239 F. 2d 115, and it cannot be applied to establish contributory negligence as a matter of law when its assertion assumes, without more, what is really in question, that is, the decedent's knowledge that a train was there, *Kansas City Southern R. Co. v. Wiggins et al*, 5 Cir., 234 F. 2d 128, 132.

Finally, the Railroad does not succeed in demonstrating that such palpable error has been made, such a manifest miscarriage of justice has occurred, for us to hold that the District Court abused his discretion in denying the motion for new trial because the verdict was wrong even though supported by some evidence. *Commercial Credit Corporation v. Pepper*, 5 Cir., 187 F. 2d 71; *Whiteman v. Pitrie*, 5 Cir., 220 F. 2d 914; *Marsh v. Ill. Central R. Co.*, 5 Cir., 175 F. 2d 498, 500.

AFFIRMED.

TUTTLE, Circuit Judge, dissenting:

I dissent. I think there was no proof of negligence

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[8] *United States Fidelity & Guaranty Co. v. McCullough*, 5 Cir., 202 F. 2d 269, cert. den., 346 U.S. 868, 98 L. Ed. 378; *Allen v. Texas & Pacific Ry. Co.*, 5 Cir., 195 F. 2d 545, *DeLoach v. Louisiana & Arkansas R. Co.*, 5 Cir., 210 F. 2d 921; *Domite v. Thompson*, 9 So. 2d 55; *Ramsey v. La. & Ark. Ry. Co.*, 70 So. 2d 171; *Gates v. A. & L. M. R. Co.*, 186 So. 835.

[9] This disposes of the further asserted error that the Court should have given the Railroad's requested instruction: "A train across a highway constitutes a most impressive notice to drivers of motor vehicles that crossing is temporarily blocked."

on the part of the railroad that had any causal connection with the collision, on a private road, with a tractor whose driver crossed the tract daily and who was under standing instructions from his employer to approach the track cautiously. Moreover the testimony of the only eyewitness completely ruled out any possibility that the tractor was struck by the locomotive.

I think the judgment should be reversed.

A true copy
Test:

/s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit New Orleans, Louisiana

(SEAL)

APPENDIX B

JUDGMENT.

Extract from the Minutes of April 12, 1957.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

No. 16294. *versus*

MADGE REED WATKINS, Individually and as Natural Tutrix of her Minor Child, RICHARD WESLEY WATKINS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, The Texas and Pacific Railway Company, and the Surety on the supersedeas bond herein, The Fidelity and Casualty Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Tuttle, Circuit Judge, dissenting."

* * * * *

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of June 14, 1957.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

No. 16294. *versus*

MADGE REED WATKINS, Individually and as Natural Tutrix of her Minor Child, RICHARD WESLEY WATKINS.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Tuttle, Circuit Judge, dissenting."